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I. Introduction

Federal antitrust jurisprudence has developed in this nation to protect competition and consumers from the damaging effects of unreasonable restraints of trade including practices such as monopolization and price fixing. The law governing trade restraints originated at English common law and has continued as a vital force in a number of states. In recent years most state legislatures have adopted affirmative antitrust programs to complement federal activity and to attack local commercial impediments.

The need for antitrust enforcement in the Commonwealth has long existed; yet the Pennsylvania legislature has not resolved to authorize the attorney general and injured private parties to vindicate their rights through specific prohibitions that can be enforced with effective remedies. This article describes that necessity through an examination of the manner in which trade restraints have been handled at common law and under statutory schemes. The particular problems of Pennsylvania trade regulation are outlined and an analysis of recent legislative proposals is offered in an effort to guide those concerned with antitrust problems to a worthwhile solution.

II. History of Antitrust Enforcement

A. Common-Law Basis

Prior to the enactment of the Sherman Act in 1890,[1] antitrust law existed in various forms in different states based on the common law.[2] Contracts in unreasonable restraint of trade were considered

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1. Act of July 2, 1890, Ch. 647, 26 Stat. 209, *as amended,* 15 U.S.C. § 1 *et seq.* (1976).
2. *See* H. THORELLI, THE FEDERAL ANTITRUST POLICY 9-54 (1954); Adler, *Monopoliz-*

void and unenforceable.[3] For example, the courts invalidated restrictive covenants that prevented an individual from practicing his trade, damaged the public through decreased competition, and increased the likelihood that the covenantor would become a public charge.[4] Subsequently, the common law was expanded to declare void other contracts in restraint of trade. The courts refused to enforce agreements established among manufacturers to fix prices and divide profits because the combinations were established to create monopolies that would inevitably injure the public.[5]

Nevertheless, astute businessmen sought to circumvent the judicial decisions disfavoring contracts in restraint of trade by adapting the trustee device as a business management instrument to avoid entering into unenforceable contracts.[6] The management of previously competing business entities or the resources of those entities were thus subjected to centralized control, and the traditional basis for attack under the common law was avoided.[7] Thus, despite the ability of the common law to adapt to changing business conditions and, in many cases, to render agreements that restrained trade invalid, the courts "never proved a very effective means in actually throt-

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ing at Common Law and Under Section Two of the Sherman Act, 31 HARV. L. REV. 246 (1917); Dewey, *The Common-Law Background of Antitrust Policy*, 41 VA. L. REV. 759 (1955).

3. The law of contractual restraints originated with covenants, made by individuals selling their businesses, not to practice a trade in a defined area for certain periods of time. The invalidation of these covenants was a carryover from the English common law. *See, e.g.,* Mitchel v. Reynolds, 24 Eng. Rep. 347 (1711).

4. Alger v. Thatcher, 36 Mass. (19 Pick.) 51, 54 (1837); *cf.* Anderson v. Jett, 89 Ky. 375 (1899) (broadly condemning any agreement that aims to interfere with free competition in any line of business).

5. In Central Ohio Salt Co. v. Guthrie, 35 Ohio St. 666 (1880), enforcement was denied when suit was brought against a non-cooperative member of a joint agency of salt manufacturers who had agreed to fix prices and divide profits. In Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911), a resale price maintenance provision, requiring resellers in the distributive chain to sell medical preparations only at the prices dictated by the manufacturer, was declared an invalid restraint on alienation. Although the case was decided by the United States Supreme Court after the enactment of the Sherman Act, the ruling was based on common law traditions condemning restraints on alienation and other disfavored contractual restraints that are broader than necessary for the protection of the party who requires the restraints.

6. H. THORELLI, *supra* note 2, at 48-49; *see,* 1 H. TOULMIN, A TREATISE ON THE ANTITRUST LAWS OF THE UNITED STATES, § 4.1-4.4, at 93-95 (1949).

"In practice, a trust resulted when the stockholders of a corporation deposited their certificates with a board of trustees. The latter were given full management control and power over the corporations which were represented by these shares." 1 J. VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION § 1.03[5][b] n.111 (1978).

Judicially the trust device has been defined as "[a] combination of interests for the purpose of regulating and controlling by means of a common authority the use, supply, or disposal of some kind of property." Dairymen's League Coop. Ass'n v. Brockway Co., 173 Misc. 183, 187; 18 N.Y.S.2d 551, 556 (1940). *See* Harding v. American Glucose Co., 182 Ill. 551, 620, 55 N.E. 577, 600 (1899), *appeal dismissed,* 187 U.S. 651 (1902).

7. *See, e.g.,* Standard Oil Co. of N.J. v. United States, 221 U.S. 1 (1910).

To the dismay of the ingenious business planners, however, these trust combinations were often invalidated because the corporate charters of the individual organizations did not explicitly permit this type of arrangement. *See, e.g.,* Richardson v. Buhl, 76 Mich. 632 (1889).

tling monopoly, much less in fostering competition."[8] More effective tools than strictly defined prohibitions were necessary to combat anticompetitive practices. Penalties and remedies beyond avoidance of the contract became essential.

B. Legislative Antitrust Policy

Although the federal government would ultimately take cognizance of and act upon the need to regulate trade, the state governments developed the first legislative antitrust policies. Toward the close of the nineteenth century, but before the enactment of the federal antitrust legislation, some state legislatures enacted statutes that operated, albeit unevenly, against trade restraints[9] "to declare unlawful certain restrictive contracts and agreements that were merely unenforceable under existing common law doctrine."[10] Yet, for a number of reasons state antitrust enforcement did not adequately ensure the unimpeded flow of trade. The statutory and common law among the states lacked uniformity.[11] Furthermore, compensatory or punitive remedies for trade restraints were unavailable. More importantly, however, a panoply of monopolistic practices appeared beyond the reach of effective state enforcement.[12]

Finally, in 1890 Congress responded to the inadequacy of state regulation and passed the Sherman Act.[13] This enactment was

> designed to be a comprehensive charter of economic liberty aimed at preserving free trade and unfettered competition as the rule of trade. It rests on the premise that unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest

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8. H. THORELLI, *supra* note 2, at 51. For example, in Dolph v. Troy Laundry Machinery Co., 28 F. 553 (1886), the two largest washing machine manufacturers agreed to increase their prices and divide the profit. The court found that the agreement did not unduly restrain trade, for if purchasers were unwilling to pay the price demanded by the colluding competitors, the consumers could seek to buy elsewhere. That holding was based on an old rule that internal restraints binding only the parties are valid while external restraints aimed at third party competitors are not. Perkins v. Lyman, 9 Mass. 522 (1813); Marsh v. Russell, 66 N.Y. 288 (1876).

9. NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, STATE ANTITRUST LAWS AND THEIR ENFORCEMENT 1(1974) (hereinafter cited as STATE ANTITRUST LAWS); Rubin, *Rethinking State Antitrust Enforcement*, 36 FLA. L. REV. 653, 657 (1974). At least thirteen states had antitrust laws before passage of the Sherman Act in 1890. *Id.*

10. Rubin, *supra* note 9, at 660; *see* United States v. Addyston Pipe & Steel Co., 85 F. 271, 279-94 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899) (discussion of state common-law doctrine).

11. H. THORELLI, *supra* note 2, at 36.

12. J. BURNS, ANTITRUST DILEMMA: WHY CONGRESS SHOULD MODERNIZE THE ANTITRUST LAWS 6 (1969).

> In the latter half of the 19th century the growth of industrial trusts and combinations threatened the freedom of the market place and led to demands for legislation to curb the increased concentration of economic power. The evils feared from such concentration were restraints on competition resulting in higher prices, restrictions on production and other market controls detrimental to the public interest.

Id.

13. 15 U.S.C. § 1 *et seq.* (1976).

material progress, while at the same time providing an environment conducive to the preservation of our democratic and social institutions.[14]

It was axiomatic that "the law . . . [did] not seek to hinder or punish the successful businessman, but rather to guarantee that such success [was] built upon an economic order patterned upon our cherished philosophy of freedom of enterprise."[15] That guarantee was embodied in two substantive prohibitions. Section One of the Sherman Act [16] declared illegal all contracts, combinations and conspiracy in restraint of trade. Section Two[17] condemned monopolization, attempts to monopolize and conspiracies to monopolize. Violation of either section constituted a misdemeanor and was punishable by a fine up to $5,000 and imprisonment up to one year. Temporary injunctive relief was also available to the government.[18] In addition, the statute provided for private enforcement by permitting persons injured by antitrust violations to sue the alleged violator for treble damages, costs of the suit, and reasonable attorney's fees.[19] Thus, although the substantive prohibitions were essentially restatements of the common law,[20] the penalties obtainable by the government and the remedy available to private plaintiffs represented an important step beyond the historical bounds of trade regulation.

1. Judicial Applications of the Sherman Act.—As cases were litigated under the Sherman Act, judicial interpretations of the statute expanded and defined the broad proscriptions of Sections One and Two rendering the statute flexible, but effective. For example, Section One addresses all restraints of trade in interstate commerce,[21] yet that provision is construed to prohibit only unreasonable restraints.[22] More importantly, however, since the problem of determining whether a particular restraint is unreasonable is often complex,[23] a number of restraints have been classified as illegal per

14. Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958).

15. State v. Lawn King, Inc., 150 N.J. Super. 204, 212, 375 A.2d 295, 299 (Law Div. 1977); *Statement of Vincent X. Yakowicz*, Solicitor General, Department of Justice, Commonwealth of Pennsylvania, on House Bill 845, Before the Consumer Affairs Committee, House of Representatives, Nov. 17, 1977 (hereinafter cited as *Statement by Vincent Yakowicz).*

16. Ch. 647, 26 Stat. 209 (1890) (current version at 15 U.S.C. § 1 (1976)).

17. Ch. 647, 26 Stat. 209 (1890) (current version at 15 U.S.C. § 2 (1976)).

18. Ch 647, 26 Stat. 209 (1890), § 4, (amended 1911, 1948) (current version at 15 U.S.C. § 4 (1976)).

19. Ch. 647, 26 Stat. 209 (1890), § 7, (current version at 15 U.S.C. § 15 (1976)).

20. *See* United States v. American Tobacco Co., 221 U.S. 106, 179-80 (1911); Pulpwood Co. v. Green Bay Paper & Fiber Co., 168 Wis. 400, 405, 170 N.W. 230, 232, *cert. denied,* 249 U.S. 610 (1919).

21. Trade is restrained whenever it is hindered, obstructed, or destroyed. United States v. Keystone Watch Co., 218 F. 502 (E.D. Pa. 1915), *appeal dismissed,* 257 U.S. 664 (1921).

22. Standard Oil Co. of N.J. v. United States, 221 U.S. 1 (1911); Ace Beer Distribs., Inc. v. Kohn Inc., 318 F.2d 283 (6th Cir.), *cert. denied,* 375 U.S. 922 (1963), *rehearing denied,* 375 U.S. 982 (1964).

23. *See* Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 50 n.16 (1977).

se because the restrictions have a pernicious effect on competition and lack any redeeming virtue.[24] Horizontal price fixing—an agreement by competitors determining at what price their products will sell— is illegal on its face.[25] Price fixing is also condemned per se if it is imposed vertically in the distributive chain by a supplier upon a reseller.[26] Other trade restraints that are equally offensive per se include dividing markets[27] where, or customers to whom, competitors will seek to distribute their products,[28] organizing group boycotts to victimize fellow competitors,[29] and conditioning the sale of desired products or services upon the purchase of undesired products or services.[30]

Although the monopoly offenses of Section Two represent a specific type of restraint on trade,[31] trials for alleged monopolistic practices are apt to be more complex than cases involving alleged per se offenses.[32] Of the three types of monopoly offenses proof of ac-

24. Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958). Restraints that are not classified as per se violations are subject to the "rule of reason," and the defendant may introduce evidence to substantiate the reasonableness of the restraint. Therefore, a plaintiff may prove a per se violation by showing the existence of the restraint, while the additional proof of unreasonableness of the restraint is necessary for a violation under the rule of reason.

25. United States v. Trenton Potteries Co., 273 U.S. 392 (1927). Any tampering by competitors for the purpose and effect of raising, depressing, pegging, stabilizing or fixing prices is likewise illegal per se. United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

26. Albrecht v. Herald Co., 390 U.S. 145 (1968) (maximum vertical price fixing); Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911) (decided under common-law principles but applicable to § 1 of the Sherman Act). Vertical price fixing is commonly known as resale price maintenance.

27. United States v. Topco Assocs., Inc., 405 U.S. 596 (1972) (supermarket owners association could not allocate exclusive sales areas to members); Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899).

Vertical market division (imposed by a supplier upon resellers), however, is subject to invalidation only under the rule of reason. Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977), *overruling,* United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).

28. United States v. Topco Assocs., Inc., 405 U.S. 596 (1972).

29. United States v. General Motors Corp., 384 U.S. 127 (1966)(local G.M. auto dealers cooperated to force G.M. to prevent certain dealers from selling to discount houses); Klor's Inc. v. Broadway-Hale Stores, Inc., 395 U.S. 207 (1959) (chain store induced suppliers to discontinue selling to a small competitor of the chain or to sell only at discriminatorily high prices).

30. This practice is commonly called a "tie-in" and occurs when a seller with sufficient economic power requires as a precondition for the purchase of a desired or "tying" product or service the purchase of an undesired or "tied" product or service. *See, e.g.,* Northern Pac. Ry. v. United States, 356 U.S. 1 (1958) (railroad sold and leased land on the condition that buyers and lessees shipped over its lines all goods produced on that land as long as the freight rates were competitive). A more limited prohibition against tie-ins is proclaimed in § 3 of the Clayton Act, 15 U.S.C. § 14 (1976), but in any event, tie-in arrangements are merely one specie of unreasonable trade restraints.

31. United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 150 (1940); United States v. Whiting, 212 F. 466 (D. Mass. 1914); *see* Dunne, *Oregon's "Little Sherman Act,"* 56 ORE. L. REV. 331, 339 (1977) (monopoly cannot be considered illegal per se).

32. For example, litigation in United States v. International Business Mach. Corp., Civil Action 69 (S.D.N.Y. filed Jan. 17, 1969), commenced nine years ago. Recently the Department of Justice finished presenting its evidence in support of the charge that IBM is a monopolist. The presentation of the government's case required nearly three years during which 72,000 pages of transcript accumulated, in part from the 49,000 exhibits entered into evidence

tual monopolization is the most complicated. Two major elements constitute monopolization:

> (1) the possession of monopoly power in the relevant market, and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen or historic accident.[33]

The first requirement is said to exist when a competitor possesses "the power to control prices or exclude competition."[34] The relevant market must be ascertained to discover if the power exists. This requires a determination of the appropriate product[35] and geographic[36] markets. The second major element of monopolization can exist without the presence of specific intent, although the courts have found the presence of general interest or deliberateness when the monopoly was a probable result of the action pursued.[37]

The second type of monopoly offense, the attempt to monopolize, is considered complete when trade practices are utilized "which would, if successful, accomplish monopolization and which, though falling short, nevertheless approach so close as to create a dangerous probability of [monopolization]. . . ."[38] This offense requires a showing of specific intent before a violation will be found.

Finally, conspiracies to monopolize are said to occur when the parties to a combination seek substantial control of the market along with the restriction of competition.[39]

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and the 69 million documents made available to the government by IBM. Wall Street Journal, April 27, 1978 at 8, col. 2.

33. United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966); Morton Bldgs. of Neb., Inc. v. Morton Bldgs., Inc., 531 F.2d 910, 918 (8th Cir. 1976).

34. United States v. E. I. duPont de Nemours & Co., 351 U.S. 377, 391 (1956). *Cf.* United States v. Grinnell Corp., 384 U.S. 563, 571 (1966) (monopoly power may be inferred from the predominant share of the market held by the alleged offender). Although courts have not definitively identified the bounds of monopoly power, general guides have evolved. *See* International Boxing Club v. United States, 348 U.S. 236 (1958) (81% market share constituted a monopoly); United States v. Aluminum Co. of America, 148 F.2d 416, 424 (2d Cir. 1945) (dicta-33% market shares insufficient; 60-64% represents a doubtful monopoly.)

35. The relevant product market is defined as the market in which products are reasonably interchangeable "for purposes for which they are produced—price, use and qualities considered." United States v. E. I. duPont de Nemours & Co., 351 U.S. 377, 404 (1956). The issue in the *duPont* case was whether the relevant product market was cellophane (in which duPont held a 75% market share) or flexible packaging materials (in which duPont held less than 20% of the market).

36. The appropriate geographic market "is the area in which sellers of the particular product or service operate and to which purchasers can practicably turn for such products or services." ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 51 (1975). *See* Tampa Elec. Co. v. Nashville Coal Co., 385 U.S. 320, 327 (1961); Dunne, *supra* note 31, at 340 (relevant economic analysis may often extend beyond state lines).

37. American Tobacco Co. v. United States, 328 U.S. 781 (1946).

38. United States v. Paramount Pictures, 334 U.S. 131, 174 (1948). Furthermore, "a vertically integrated enterprise like other aggregations of business . . . will constitute a monopoly which, though unexercised, violates the Sherman Act provided a power to exclude competition is coupled with a purpose . . . to do so." *Id.*

39. *Id.*

2. Legislative Amendments—Procedures and Penalties.—Because further measures were still required to supplement the expanding field of trade regulation Congress enacted the Clayton Act in 1914,[40] which prohibited acts that were beyond the pale of the Sherman Act when the probable effect of those acts was to substantially lessen competition or tend to create a monopoly.[41] Subsequent amendments to that law have strengthened the federal legislative antitrust policy as deficiencies have appeared.

Section Five of the Clayton Act, for example, permits a private plaintiff to submit as prima facie evidence of an antitrust violation any civil or criminal antitrust judgment in favor of the United States government that would act as an estoppel between the parties.[42] This provision considerably eased the burden of proof on parties injured by antitrust offenses. A recent amendment provides that judicial actions instituted by the government would also suspend the statute of limitations from running against private suitors.[43]

Penalties for violation of the Sherman Act were increased in 1974[44], and all offenses were reclassified as felonies.[45] Moreover, actions instituted by the United States Department of Justice are no longer limited to the remedies of imprisonment, fines and injunctions. Now the federal government is entitled to sue for damages sustained in its proprietary functions,[46] although recoveries are limited to actual rather than treble damages.[47]

Another needed change occurred in 1962 when the United States Attorney General's antitrust investigative authority was

40. Act of Oct. 15, 1914, Ch. 323, 38 STAT. 73 (current version at 15 U.S.C. § 12 *et seq.* (1976)).

41. Although the Sherman Act had a broad impact, certain activities were excluded from coverage. The exemptions included the activities of labor or agricultural organizations when these groups were pursuing legitimate self-help objectives. 15 U.S.C. § 17 (1976).

42. *Id.* § 5(a); 15 U.S.C. § 16(a) (1976). The only circumstance preventing a private plaintiff from using a favorable government judgment existed when the government proceeding terminated in a consent judgment entered before testimony was taken. *Id.*

43. Hart-Scott-Rodino Antitrust Improvements Act of 1976, Title III, § 302(2), 15 U.S.C. § 16(i). There are specific qualifications to this tolling provision. If the United States seeks in its proprietary capacity to recover damages for an antitrust violation, the statute of limitations continues to run. Furthermore, if a private suitor seeks damages or if a state attorney general acts as *parens patriae* for residents of his state who have been injured through antitrust violations, *see* text accompanying notes 64-65 *infra*, either action must be commenced within the period of suspension or within four years after the cause of action accrued.

44. Antitrust Procedures and Penalties Act of 1976, Pub. L. No. 93-528, 88 STAT. 1706; 15 U.S.C. §§ 1, 2, 3 (1976).

45. *Id.* The potential terms of imprisonment rose from one to three years and the potential fines rose from $50,000 to $1,000,000 for corporations and $100,000 for other persons. *Id.*

46. Act of July 7, 1955, Pub. L. No. 84-137, § 1, 69 STAT. 282, 15 U.S.C. § 15(a) (1976). The federal government, for example, would sustain compensable injury if the firms from which it purchased certain goods combined to eliminate competition and increase the price of those goods sold to federal agencies.

47. The private treble damages provision in § 7 of the Sherman Act was incorporated into § 4 of the Clayton Act, 15 U.S.C. § 15 (1976).

strengthened by the Antitrust Civil Process Act.[48] That statute empowered the Attorney General to issue and serve civil investigative demands (CID's)[49] on persons under investigation if the Government has reason to believe that they may be in control of documentary material relevant to a civil antitrust investigation.[50] Further legislation augmented the scope of the CID to include demands upon persons to give depositions, as well as to produce documents, and to allow service upon any individual who may possess information relevant to an antitrust investigation, as opposed to only those under investigation.[51] Congress also established appropriate safeguards to protect the confidentiality of data obtained through CID's.[52]

Despite the stricter penalties, however, the most significant addition to the antitrust laws is found in the provision allowing state attorneys general to maintain actions in federal courts as *parens patriae* for violations of the Sherman Act that cause injuries to natural persons residing within that attorney general's jurisdiction.[53] Nevertheless, the effectiveness of *parens patriae* litigation is currently

48. Act of Dec. 21, 1974, Pub. L. No. 87-664, 88 STAT. 1706, 15 U.S.C. §§ 1311-7 1314 (1976).

49. The CID is a data gathering tool that permits the United States Department of Justice to acquire evidence related to a civil antitrust investigation before a complaint has been filed. The CID cannot contain a demand for any material that would be unreasonable if contained in a subpoena duces tecum for a grand jury antitrust investigation or privileged from disclosure in such an investigation. *Id.* § 3(c).

50. *Id.* § 3(a).

51. Hart-Scott-Rodino Antitrust Improvements Act of 1976, § 3, Pub. L. No. 94-435 (amending 15 U.S.C. § 1312 (1976)).

52. A custodian appointed by the Chief of the Antitrust Division of the Department of Justice takes possession of the information thus obtained and may not release it for examination to anyone other than an authorized Department of Justice employee without the consent of the person who produced the material. Antitrust Civil Process Act, Pub. L. No. 87-664, 88 STAT. 1706 (1974), 15 U.S.C. § 1313(e) (1976) (amended 1976).

53. Hart-Scott-Rodino Antitrust Improvements Act of 1976, Title III, § 301, Pub. L. No. 94-435, 15 U.S.C. § 15(c) (1976). In the United States *parens patriae* means the state as sovereign, "referring to the sovereign power of guardianship over persons under a disability." BLACK'S LAW DICTIONARY 1269 (Revised 4th ed. 1968). Millions of consumers who could suffer slight overcharges in goods or services due to an antitrust violation might appropriately be considered under a disability with respect to vindication of their rights. This is especially true when each individual purchase represents a slight overcharge but the aggregate amount is great. Due to the slight size of each claim, injured parties would find suit in federal court unrealistic. The *parens patriae* provision thus protects a right that otherwise might continue to be violated with impunity.

Under the *parens patriae* authorization, Congress has designated methods to determine the amount of damages suffered by each injured person. 15 U.S.C. § 15(d) (1976). The means by which damages may be distributed are also governed by statute. 15 U.S.C. § 15(e) (1976).

When a state attorney general pursues *parens patriae* litigation, each person represented may separately vindicate his injury by electing to exclude the portion of the claim attributable to him, but the attorney general must first provide each such individual with notice of the initiation of the *parens patriae* proceeding. 15 U.S.C. § 15c(b) (1976).

The authority of a state attorney general to sue for damages or injunctive relief on behalf of consumers in his state was recently affirmed in *In re* Montgomery County Real Estate Litigation, [1978-1] TRADE CAS. (CCH) ¶ 62,070 (D.Md. 1978).

in jeopardy. In 1977 the United States Supreme Court ruled in *Illinois Brick v. Illinois*[54] that indirect purchasers may not recover from price-fixing competitors if the injured buyer purchased indirectly from a middleman. Most antitrust violations that result in consumer injuries do not arise from transactions directly between offending producers and consumers. Therefore, when a state attorney general sues as *parens patriae* on behalf of those who sustain injuries at a point in the distributive chain that is distant from antitrust violators, the state attorney general no longer has standing to pursue the cause of action. Fortunately for injured indirect purchasers, both houses of Congress have reported bills that would overrule *Illinois Brick*.[55] These bills are especially important because they contain sections that would grant retroactive effect to the overruling statute, thus preserving a number of claims presently before the courts.[56]

3. The Result—State Antitrust Programs Became Subordinate to Federal Antitrust Enforcement.—The same movement that propelled the development of federal antitrust policy apparently facilitated antitrust enforcement inactivity at the state level.[57] Although federal preemption was not mandated, state antitrust enforcement assumed a substantially diminished role. The decline was attributed to a number of factors[58] that reflected legislative, executive, and public apathy. Recently, however, state antitrust activity revived.[59]

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54. 431 U.S. 270 (1977).

55. On May 25, 1978 the Senate Judiciary Committee reported S. 1874 to overrule *Illinois Brick*. ANTITRUST & TRADE REG. REP. (BNA) 3-A (June 1, 1978). The House Judiciary Committee reported H.R. 1142, a similar bill, on June 20, 1978 ANTITRUST & TRADE REG. REP. (BNA) 11-A—12-A (June 22, 1978).

56. *See* reports cited in note 55 *supra*; *Statement of Vincent Yakowicz, supra* note 15, at 8.

57. J. FLYNN, FEDERALISM AND STATE ANTITRUST REGULATION 95 n.358 (1964); Dunne, *supra* note 31, at 353; Rahl, *Toward a Worthwhile State Antitrust Policy,* 39 TEX. L. REV. 753, 755 (1961); Rubin, *supra* note 9, at 697-98.

58. Professor Rahl identified inadequate appropriations and lack of enforcement enthusiasm by state attorneys general as the primary reasons for state inactivity. Rahl, *supra* note 57, at 755. To that list Professor Rubin has added

> ineffective or nonexistent investigative procedures, lack of trained full-time antitrust personnel, cumbersome and often unworkable remedies and sanctions, antiquated laws and procedures, the apprehension in many state capitols that vigorous enforcement will drive industry from the state, and the forceful opposition of businessmen and their attorneys to meaningful state reform.

Rubin *supra* note 9, at 697-98 (footnotes omitted).

59. Soma, *Enforcement Under the Illinois Antitrust Act,* 5 LOY. CHI. L.J. 25, 44 (1974); Rubin, *supra* note 9, at 654, 699-701; *State Prosecutors Crack Down on Business*, BUS. WEEK 53 (May 15, 1978).

The resurgence in California is noteworthy because it represents the recognition that state antitrust legislation is vital in industrial states. That resurgence was achieved, in part, through the combination of the population explosion with its consequent increase in public procurement, federal cases that revealed how illegal restraints on trade increased the cost of government, and a lobbying effort by small businessmen. STATE ANTITRUST LAWS *supra* note 9, at 3.

Many states have enacted modern antitrust statutes[60], and numerous state attorneys general are strengthening and more vigorously utilizing enforcement capabilities.[61] In Pennsylvania, however, the problem is exacerbated because no state antitrust legislation has ever existed.[62] Moreover, the common law of trade regulation has not developed to the point at which a modern antitrust jurisprudence is identifiable.

4. Pennsylvania's Deficient Common Law of Trade Regulations.—Pennsylvania retains the common law of restraint of trade and monopolies as it existed before the enactment of federal and state legislation. The archetypal unreasonable restraint of trade, the overbroad covenant not to compete, has long been unlawful in Pennsylvania.[63] In addition, when competitors have combined to restrain commerce by decreasing competition and, therefore, increasing their market power, enforcement of the agreement has been denied to a party to the combination.[64] Recently, the Pennsylvania Supreme Court noted in *Collins v. Main Line Board of Realtors*[65] that it would be guided by interpretations of the Sherman Act as the embodiment of common law principles in ruling that a real estate multiple listing service unreasonably restrained trade by excluding competing realtors.

Despite that implicit recognition that Pennsylvania's jurisprudence regarding restraints of trade must be modernized, *Collins* supplied no specific or broadly applicable substantive prohibitions.

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60. Soma, *supra* note 59, at 44.

61. STATE ANTITRUST LAWS, *supra* note 9, at 63-64.

62. Pennsylvania has an Unfair Trade Practices Act, which is modeled after the Federal Trade Commission Act. 15 U.S.C. § 45 (1976). The federal law prohibits all unfair methods of competition or deceptive acts or practices in or affecting commerce, while the state law declares illegal only certain types of those methods or practices. PA. STAT. ANN. tit. 73, §§ 201-3—201-2(4) (Purdon Supp. 1978). These prohibitions are consumer protection regulations prohibiting such acts as false advertising or passing-off and are not traditional antitrust provisions. Furthermore, the remedies and penalties of the Unfair Trade Practices Act lack the compensatory and deterrent effect of general antitrust legislation. There is no private right of action; only the attorney general may enforce the law by seeking injunctions or assurances of voluntary compliance, the latter of which may contain some compensation for those injured by violations. PA. STAT. ANN. tit. 73, §§ 201-4—201-5 (Purdon Supp. 1978).

63. Cleaver v. Lenhart, 182 Pa. 285, 37 A. 811 (1897) (based on failure of consideration); *see* Sun Drug Co. v. West Penn Realty Co., 439 Pa. 452, 268 A.2d 781 (1970); Bachman v. Gogel, 51 Pa. D. & C.2d 98 (C. P. Northam. 1970).

64. Nester v. Continental Brewing Co., 161 Pa. 473, 29 A. 102 (1894) (brewers prohibited from fixing the price of beer in Philadelphia and Camden, N.J.); *cf.* Schwartz v. Laundry & Linen Supply Drivers' Union, Local 187, 339 Pa. 353, 14 A.2d 438 (1940) (union could not impose requirement on employers to stop dealing with independent laundry transporters who performed the same functions as union members).

65. 452 Pa. 342, 349, 304 A.2d 493, 496, *cert. denied,* 414 U.S. 979 (1973); *cf.* Hirshfield v. York Bd. of Realtors, Inc., 86 York 18, 59 Pa. D. & C.2d 243 (C. P. York 1972) (court required showing that membership listing service was an economic necessity before membership limitations would be found to unreasonably restrain trade). In *Collins,* Chief Justice Jones based his dissent, in part, on the view that the multiple listing service does not unreasonably restrain trade because it is not essential for all realtors. 452 Pa. at 359-60, 304 A.2d at 501.

The decision did not and could not add new remedies or penalties for acts that would be antitrust violations—if an antitrust law were in force. Of equal importance, no procedural innovations were introduced in *Collins.* The remedy in that case was an injunction requiring the realtors' association to allow Pennsylvania licensed realtors to participate in the multiple listing service. The injunction was merely the converse of declaring the exclusionary rules of the association void and unenforceable—the antiquated common-law remedy. The recognition that private damage actions[66] along with governmental criminal and civil penalties might be appropriate remedial and deterrent tools was notably absent. Such a declaration is properly within the sphere of the legislature.[67]

III. The Need for State Antitrust in Pennsylvania

As Mr. Justice Marshall observed

> [a]ntitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And a freedom guaranteed each and every business, no matter how small, be it the freedom to compete-- to assert with vigor, imagination, devotion and ingenuity whatever economic muscle it can muster.[68]

Forty-six[69] state legislatures, including those of every major industrial state except Pennsylvania, have acknowledged that the freedoms identified by Justice Marshall require more extensive protection than that afforded by federal legislation.

Federal antitrust enforcement is limited in a variety of ways, the most fundamental of which is the interstate commerce requirement. The United States Department of Justice has jurisdiction to act only

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66. The Court did mention that it would grant injunctive relief when, *inter alia,* legal relief is inadequate although there are no reported cases in which a Pennsylvania court has awarded damages to an injured person not a party to a contract unreasonably restraining trade.

Inadequate private remedies have been a primary cause for public apathy toward state antitrust activities. Note, *The Present Revival and Future Course of State Antitrust Enforcement,* 38 N.Y.U. L. REV. 575, 584 (1963) [hereinafter cited as *State Antitrust Revival*]. The ineffectiveness of common law prohibitions and relief have also been criticized in Oregon. Dunne, *supra* note 31, at 332. *But see generally* 35 U. PITT. L. REV. 323 (1973).

67. Criminal penalties have been oft cited as a valuable deterrent to antitrust violation *see* notes 168-171 and accompanying text *infra* and they have a common-law origin for such practices as conspiracy to monopolize. H. THORELLI, *supra* note 2, at 53. It would be inappropriate, however, for a Pennsylvania court to impose a criminal penalty for a common law offense, because the Commonwealth's criminal law is now statutory. *See* People v. Legeri, 239 App. Div. 47, 266 N.Y.S. 86 (1933). Although criminal conspiracy is illegal in Pennsylvania, 18 PA. CONS. STAT. ANN. § 903(a) (Purdon 1973), monopolization is not a crime in the Commonwealth; therefore, conspiracy to monopolize is not a crime in Pennsylvania.

68. United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972).

69. States with no antitrust law include Delaware, Pennsylvania, Rhode Island and Vermont.

when a challenged restraint is in, or substantially affects, commerce between the states.[70] In *Penthouse International LTD v. Putka,*[71] a concessionaire at Cleveland Hopkins International Airport was prohibited from selling Penthouse Magazine. Even though the concessionaire employed items of equipment and purchased for sale some consumer products that moved at various times in interstate commerce, the court ruled that only a decidedly local effect resulted from removal of the magazines (along with certain other products) from sale, and, therefore, Sherman Act jurisdiction was absent.[72] *Rosemound Sand and Gravel Co. v. Lambert Sand and Gravel*[73] represents an even more glaring example of the necessity for state antitrust enforcement. In that case the plaintiff, a supplier of sand and gravel, alleged that the defendant threatened one of the plaintiff's customers with the discontinuance of business relations if that customer did not terminate all purchases from the plaintiff.[74] The court declined to decide the case on the merits because the sand and gravel that the defendant supplied was sold in Louisiana for Louisiana projects and never entered the flow of interstate commerce.[75] Other cases in which subject matter jurisdiction was denied for failure to meet the threshold requirements include conspiracy to prevent construction of a competing bowling alley,[76] restrictive covenants in shopping center leases,[77] and price fixing of commission rates by competing realtors.[78] A number of specific exemptions from the Sherman Act could also properly be attacked on the state level.[79]

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70. Penthouse Int'l LTD. v. Putka, 436 F. Supp. 1220, 1230 (N.D. Ohio 1977); McClain v. Real Estate Bd. of New Orleans, Inc., 432 F. Supp. 982, 983 (E.D. La. 1977); St. Anthony-Minneapolis, Inc. v. Red Owl Stores, Inc., 316 F. Supp. 1045 (D. Minn. 1970); UNIFORM STATE ANTITRUST ACT, Commissioners' Prefatory Note; Soma, *supra* note 59 at 332; *see, e.g.,* Rahl, *supra* note 57, at 759.

71. 436 F. Supp. 1220 (N.D. Ohio 1977).

72. *Id.* at 1230.

73. 330 F. Supp. 549, 551 (E.D. La. 1971), *aff'd,* 469 F.2d 416 (5th Cir. 1972).

74. 330 F. Supp. at 551.

75. 469 F.2d at 419.

76. Lieberthal v. North Country Lanes, Inc., 332 F.2d 269 (2d Cir. 1964).

77. St. Anthony-Minneapolis, Inc. v. Red Owl Stores, Inc., 316 F. Supp. 1045 (E.D. Minn. 1970).

78. McClain v. Real Estate Bd. of New Orleans, Inc., 432 F. Supp. 982 (E.D. La. 1977).

79. For example, the McCarran-Ferguson Act, 15 U.S.C. §§ 1011, 1012 (1976) removes the business of insurance from Sherman Act coverage. In Doctors, Inc. v. Blue Cross of Philadelphia, 557 F.2d 1001 (3d Cir. 1976), a significant case originating in Pennsylvania, the court of appeals declined to exercise its jurisdiction because of the insurance exemption. The plaintiff hospital had alleged, *inter alia*, that the defendant induced a group boycott of plaintiff's patients and that the defendant refused to deal with the plaintiff pursuant to an agreement being negotiated with other hospitals. A state antitrust act could have operated against that restraint. In Arizona, the state antitrust law was invoked in a similar case. In Sterman v. Transamerica Title Ins. Co., No. 2-CA-CIV 2597 (Ariz. App. Jan. 18, 1978), plaintiff charged a group of title insurers, rating bureaus, and a title insurer's association with conspiracy to fix the price of title insurance. The state court exercised jurisdiction ruling that extensive regulation of the title insurance industry by the state insurance department does not preempt the field (pursuant to analogy to the federal act of state exemption of Parker v. Brown, 317 U.S. 341 (1943))

Beside the jurisdictional requirements, proceedings on behalf of the United States are constrained by a lack of resources. Even when a local antitrust violation sufficiently affects interstate commerce to meet the jurisdictional requirements of the Sherman Act, the federal Department of Justice may decline to pursue judicial action because other enforcement problems are more significant.[80] The Antitrust Division of the Department of Justice is geared for complex monopolization and merger litigation.[81] State enforcement mechanisms are not.[82] Hence, efficient resource allocation is achieved when the federal government handles larger cases while leaving less complex matters, or those with decidedly local effects, to the states.

Moreover, the federal government should not be expected to bear the burden of eliminating all trade restraints throughout the nation.[83] The role that states can play in fostering an operative climate of competition is within their obligations and capabilities[84] and the contention that state antitrust laws will, ultimately, be detrimental to the state, by driving business from the state, is untenable. Antitrust policy seeks to promote the

> economic well-being through the free competitive system of producing and marketing goods. Restraints of trade abridge this system and hence are inimical to the economic health of the state. A meaningful state antitrust enforcement program would have the salutary effect of stimulating businesses within the state.[85]

The states can fulfill their proper function as overseers of competitive economies and complement the federal government by coordinating their efforts with the United States Department of Justice and attacking obvious and easily proved violations such as price fixing and market and customer allocation.[86]

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and does not preclude application of the state antitrust laws to activities outside the regulatory scheme.

80. STATE ANTITRUST LAWS, *supra* note 9, at 51; Soma, *supra* note 59, at 332; *Statement by Vincent Yakowicz, supra* note 15, at 2 (because of the flood of complaints and limited resources, federal officials must be highly selective in initiating investigations and suits).

81. *See, e.g.*, note 32 *supra* (monopoly litigation); United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963) (merger litigation); Brown Shoe Co. v. United States, 370 U.S. 294 (1962) (merger litigation).

82. UNIFORM STATE ANTITRUST ACT, Commissioner's Prefatory Note; STATE ANTITRUST LAWS, *supra* note 9, at 45; U.S. DEP'T OF JUSTICE, GRANTS TO AID STATE ANTITRUST ENFORCEMENT-APPLICATION MANUAL 7 (1977) (hereinafter cited as GRANTS); *Statement by Vincent Yakowicz supra* note 15, at 2.

83. *See* remarks by Michael L. Zaleski, Assistant Attorney General, State of Wisconsin, *reprinted in* STATE ANTITRUST LAWS, *supra* note 9, at 45.

84. Almstedt & Tyler, *State Antitrust Law: New Directions in Missouri*, 39 MO. L. REV. 489, 520 (1974).

85. *State Antitrust Revival, supra* note 66, at 579 (footnotes omitted). Furthermore, forty-six other states have comparable regulations.

86. For even with limited investigative and prosecutorial resources, states can feasibly "indict and convict beer distributors for price-fixing or paving contractors for bid-rigging." STATE ANTITRUST LAWS, *supra* note 9, at 65; *id.* at 45.

State enforcement, of course, presupposes the existence of sufficient unreasonable trade restraints against which the federal government cannot or will not act. Local incidence of antitrust violations, however, is extensive,[87] as indicated by judicial actions in other states[88] and by complaints from within Pennsylvania.[89]

Price fixing in public procurement, for example, through identical bidding and other bid rigging, is prevalent[90] and therefore a particularly appropriate target for state antitrust action. While individual consumers may not be significantly injured by such overcharges, damage to the Commonwealth in its proprietary capacity is patent.[91]

> Such schemes deplete the public treasury and result in higher taxes to state residents. State prosecution often effects a double recovery in such case; the penalty or damages awarded are supplemented by the subsequent reduction in price and truly competitive nature of future bids.[92]

States also play an important enforcement role when obtaining criminal penalties for violations.[93] In *State v. Lawn King, Inc.,*[94] an individual defendant was sentenced to two concurrent six-month jail terms and fined over $40,000 while a corporate defendant was fined $120,000.[95] The penalties were imposed for vertical price fixing, territorial allocation, tying, and other restraints on trade including an invalid restraint on alienation and a requirement that resellers of defendant's service engage in cooperative advertising.[96] In Iowa a

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87. Rahl, *supra* note 57, at 755; *State Antitrust Revival, supra* note 66, at 585.

88. *See* notes 94-100, 103-07 and accompanying text *infra.*

89. *See* notes 121-124 and accompanying text *infra.*

90. *E.g.,* State v. Robert L. Carr Co., [1978-1] TRADE CAS. (CCH) ¶62,052 (Dist. Ct. Lyon County, Minn. 1978)(defendant pleaded guilty to indictment for conspiracy to rig public construction bids and was fined $10,000, in addition to settling with a municipality for $20,000 for alleged collusion in submitting bids for a beautification project); State v. Waste Management of Wis., Inc., 81 Wis. 2d 555, 26 N.W.2d 147 (1978) (upholding conviction of a business charged with conspiring to restrain trade in the garbage hauling industry by submitting rigged bids to governmental subdivisions and allocating customers).

91. *Statement by Vincent Yakowicz, supra* note 15, at 2, 4.

92. *State Antitrust Revival, supra* note 66, at 585 (footnotes omitted).

93. *See, e.g.,* note 89 *supra;* State v. Blyth, 226 N.W.2d 250 (Iowa 1975) (conviction for conspiracy to fix prices).

94. 150 N.J. Super. 204, 375 A.2d 295 (Law Div. 1977) *supplemented on other grounds,* 152 N.J. Super. 333, 377 A.2d 1213 (Law Div. 1977).

95. *Id.* at 333, 377 A.2d at 1214.

96. *Id.* Those restraints were imposed by a lawn care service corporation upon its local franchises that provided the service. The price fixing was established by evidence that the defendant required its local franchises to charge a set amount for lawn care service and monitored its dealers' charges. The defendant allocated territories to its dealers by assigning each franchise a certain territory and prohibiting each franchisee from entering another's territory. (That violation was based on United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967), which was overruled by Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977) thus, thrusting this ruling against exclusive territories into question.) The court also found that Lawn King effectively tied the sale of its franchises to the requirement that dealers purchase chemicals and seed through the corporation's distribution system. Lawn King further restrained trade by requiring franchisees to pay for cooperative advertising and to follow pre-

"boycott committee" was enjoined from attempting to induce a supermarket to sell only union label grapes and lettuce.[97] An Ohio court has invalidated restrictive lease covenants that effectively prohibited a lessor from making future leases to any potential competitor of the party that originally demanded the restriction.[98] Injunctive relief has been awarded in New York against milk producers and distributors for price fixing and customer allocation.[99] Finally, civil relief can also take the form of penalties awarded to the state as Texas has shown by collecting over $270,000 in civil penalties in the last five years.[100]

Although a great number of criminal antitrust convictions have not occurred, the civil penalties obtained by states and judgments for private plaintiffs against local violators reflect the magnitude of the wrongful trade practices.

Despite the broad range of potential applications of civil relief, many noncriminal and some criminal proceedings do not reach trial. Rather, most antitrust cases are settled by consent decree.[101] Consent judgments are used frequently because they reduce the time necessary to conclude an antitrust litigation and also permit additional flexibility in providing a remedy.[102]

Recent state court consent judgments have included prohibitions of horizontal price fixing for private nursing[103] and towing services in New Jersey[104] and ambulance services in Illinois.[105] In New York a group of process serving enterprises acceded to a con-

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scribed formats and procedures in their individual advertising along with prohibiting dealers from using their own names when advertising the sale of the business.

97. Foods, Inc. v. Leffler, 240 N.W.2d 914 (Iowa 1976).

98. State *ex rel.* Brown v. Zayre of Ohio, Inc., 41 Ohio Misc. 117, 324 N.E.2d 186 (1974).

99. *See* N.Y. STATE DEP'T OF LAW, ANTI-MONOPOLIES BUREAU ANNUAL REPORT 2 (1976). *See also* State v. Empire City Pharmaceutical Society, Inc., No. 40789/78 (Sup. Ct., New York City, May 11, 1978).

100. Letter from Michael M. Barron, Antitrust Division Chief, Texas Attorney General's Office, to Martin Howard Katz, Deputy Attorney General, Antitrust Division, Pennsylvania Dep't of Justice (June 13, 1978).

101. STATE ANTITRUST LAWS, *supra* note 9, at 61; Letter from Thomas T. Wood, Deputy Attorney General, State of Hawaii, to Harry A. Horwitz, Legal Assistant, Antitrust Division, Pennsylvania Dep't of Justice (June 27, 1978).

A consent decree is a "device by which the defendant, while refusing to admit guilt, agrees to modify its conduct and in some cases to accept certain remedies designed to correct the violation asserted by the government." Speech by Senator John Tunney, 119 CONG. REC. 21 (1973).

102. STATE ANTITRUST LAWS, *supra* note 9, at 61.

103. State v. Nurses Private Duty Registry, No. C-1834-76 (Super. Ct., Camden County, N.J. Dec. 12, 1977).

104. State v. Allan's Towing Service, Inc., No. C-3605-76 (Super. Ct., Camden County, N.J. April 20, 1978).

105. *In re* Area Wide Ambulance Service & Jacksonville Ambulance Co., (Dec. 20, 1977), reported in NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, ANTITRUST BULL. 7 (Feb. 8, 1978). *See also In re* Ikelite Underwater Sys., (Nov. 28, 1977), reported in NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, ANTITRUST BULL. 12 (Feb. 8, 1978) (resale price maintenance in Illinois for underwater photographic accessories).

sent order mandating that they abandon any conspiracy to coerce independent process servers to terminate work for other process serving firms.[106] A group of Colorado dairy companies that were alleged to have paid illegal rebates and offered other inducements to their large customers, entered into a consent judgment resulting in fines and costs of $245,000.[107] Thus, it is apparent that the consent decree is a valuable antitrust enforcement tool.[108]

The plethora of successful cases in states with antitrust statutes supports the inference that if Pennsylvania had such a law, similar activities could be attacked. Skeptics may contend that merely because other states have found and acted against anticompetitive conduct, that is an inadequate justification for legislation in the Commonwealth. Clear evidence is available, however, that unreasonably anticompetitive conduct exists in the state.

From March to May 1977 the United States Department of Justice conducted the "Pittsburgh Project," a campaign centered in the Pittsburgh area publicizing a toll-free telephone number by which individuals could report incidents of anticompetitive conduct to the Department. Many of the callers reported putatively illegal conduct; but because the interstate commerce jurisdictional requirement was lacking, or the Department lacked adequate resources to pursue each promising complaint, a significant number of the complaints were not acted upon.[109]

Fifty-five of the grievances received would have justified further investigation and possible prosecution.[110] Tie-ins and price discriminations between food stores and food producers were reported in Westmoreland and Allegheny counties. Price fixing for real estate brokerage services were reported in various areas of the state. In Adams and Northumberland counties some garagemen agreed to fix the price for state motor vehicle inspections. Other instances of price fixing tentatively identified dentists and mortgagees as offend-

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106. State v. A.B.C. Process Serving Bureau, Inc., Index No. 40623/78 (Sup. Ct., New York City April 11, 1978).

107. *See* COLO. DEP'T OF LAW, ANTITRUST SECTION 1975-78 4 (undated). *See also id.* at 3 (description of other successful Colorado cases ending in consent judgments).

108. Satisfactory resolution of a state antitrust claim can occur at even earlier stages of litigation as long as the threat of vindication of a statutory right is available. *E.g.,* NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, ANTITRUST BULL. 8 (May 10, 1978) (private North Carolina nursing home agreed at a pre-complaint stage to terminate the use of fee schedules leading to price fixing). Furthermore, official investigations may provide sufficient incentive for businesses to cease objectionable practices. *See* N.Y. STATE DEP'T OF LAW ANNUAL REPORT: ANTI-MONOPOLIES BUREAU 3-4 (1977).

109. Telephone conversation between Bruce Wilson, Attorney, Middle Atlantic Office, United States Dep't of Justice, and Harry A. Horwitz, Legal Assistant, Pennsylvania Dep't of Justice, Antitrust Division (June 30, 1978).

110. The reports originated from almost every county in the Commonwealth and addressed a variety of unreasonable restraints in which many types of businesses were involved. More specific descriptions of the complaints are not available because these preliminary complaints are confidential.

ers. Informal allegations of predatory pricing, resale price maintenance, conspiracy to monopolize, bid rigging, and horizontal market division were also made. These are but a few examples of antitrust violations that directly injure individuals, businesses, and the state.

The presence of antitrust violations also has been indicated in Pennsylvania cases. In *Bergstedt v. City of Pittsburgh,*[111] the city counterclaimed in the Allegheny Common Pleas Court for treble damages for price fixing, but the plaintiff's preliminary objection to the matter was sustained because the court lacked jurisdiction to entertain the claim. A counterclaim for damages based upon an antitrust violation was equally unavailing in *Revlon, Inc. v. Capitol Beauty Supply Co.,*[112] for the same reason. These injuries, along with those disclosed during the "Pittsburgh Project," cannot be redressed adequately absent a state antitrust scheme.

Redress, however, is not the sole objective of an affirmative legislative policy against unreasonable trade restraints.[113] A complete state antitrust program is educational, for many business operators, particularly smaller operators, may be unaware that their anticompetitive conduct would constitute unlawful practices.[114] Thus, an active antitrust program may often remove impediments to competition without any litigation. The enactment of antitrust legislation in Pennsylvania would attain these goals through the recognition of the need to protect the state, its small businessmen, and consumers from local restraints of trade.[115]

There are no substantial reasons why the General Assembly should not approve an antitrust law. Traditionally, this type of legislation has been politically popular.[116] Furthermore, local antitrust

111. 121 Pitts L.J. 363 (Pa. C.P. Alleg. 1973). A private claimant may invoke as a defense in state court the declaration in §1 of the Sherman Act that all contracts, combinations, and conspiracies in restraint of trade are illegal. *See* C. WRIGHT, LAW OF FEDERAL COURTS §45 (3rd ed. 1976). He may not, however, invoke that clause to recover damages in state courts since the Act grants authority exclusively to the federal district courts to fashion a remedy. 15 U.S.C. §15 (1976). *See* 15 U.S.C. §4 (1976)(equitable remedies to restrain alleged antitrust violations are available only to United States attorneys through the federal district courts).

112. 79 Dauph. 91 (Pa. C.P. 1963). The court, however, did rule that a federal antitrust violation could be raised as a defense to a breach of contract action. Id. at 95.

113. For example, state attorneys general may assume greater activity as a public advocate through the deterrent effect of active enforcement, by acting against increased organized criminal activity in the economy, STATE ANTITRUST LAWS, *supra* note 9, at 1, and by providing advice to state departments and agencies to assure that their routine operations have minimal anticompetitive effects. COLO. DEP'T OF LAW, ANTITRUST SECTION 1975-1978, 7-8 (undated).

114. UNIFORM STATE ANTITRUST ACT, Commissioners' Prefatory Note, STATE PROSECUTORS CRACK DOWN ON BUSINESS, BUS. WEEK 53 (May 15, 1978).

115. *State Antitrust Revival, supra* note 66, at 579, 585, 591.

116. At the federal level

> [e]very Democratic and Republican party platform includes a promise to carry . . . [antitrust] on, to strengthen and to outdo the previous administration. Annual reports of heads of enforcement agencies point with pride to every statistic of increased

programs can operate at little or no cost to the state treasury since a large part of enforcement activity is handled by the private bar.[117] When the state attorney general does act, however, his actions can be financed through recoveries against violators that are placed in an antitrust revolving fund for further enforcement use.[118]

IV. Analysis of Necessary Provisions

A. Scope of Legislation

Pennsylvania antitrust law must prohibit intrastate violations and interstate violations that significantly affect the Commonwealth but against which the United States Department of Justice cannot or will not act.[119] State regulation over activity that has a local nexus and affects interstate commerce is the accepted jurisdictional scope for state antitrust laws.[120]

The earliest indication that the Sherman Act should not preempt state trade regulation was offered in a speech by Senator Sherman, the individual for whom that legislation was named.

> This bill, as I would have it, has for its single object to invoke the aid of the courts of the United States . . . to *supplement the enforcement* of the established rules of the common and statutory law *by the courts of the several States* in dealing with combinations that affect injuriously the industrial liberty of these citizens of the States.
>
> It does not announce a new principle of law, but applies old and well-recognized principles of the common law to the compli-

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activity. Its political pedigree cannot be better demonstrated than by looking at Congress, where it will be seen that no less than six committees, led by the top-ranking judiciary committees, carry on a tremendous amount of continuing activity in this area.

Rahl, *supra* note 57, at 765 (footnotes omitted).

117. Dunne, *supra* note 31, at 353.

118. *E.g.,* COLO. DEP'T OF LAW, ANTITRUST SECTION,1975-1978 1 (undated). *See also* note 179 and accompanying text for a discussion of antitrust revolving funds; NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, ANTITRUST REVOLVING FUNDS (March 1978).

119. *State Antitrust Revival, supra* note 66, at 585. *See* notes 80-82 and accompanying text *supra*.

> There are important areas, where, because of the purely intrastate nature of the practice, or the failure of Congress to extend a particular facet of federal antitrust to the constitutional limit, state antitrust enforcement may be the only available remedy. In other areas where jurisdiction is concurrent, it may be the states that are better equipped to treat the restraints, which though affecting or in commerce, are primarily of local impact.

U.S. DEP'T OF JUSTICE, ANTITRUST HANDBOOK, FEDERAL-STATE CONFERENCE ON ANTITRUST PROBLEMS 2 (1969) (footnotes omitted). *But cf.* California v. Zook, 336 U.S. 725 (1949) (activities that are an offense against State and federal governments may be punished by either).

120. UNIFORM STATE ANTITRUST ACT, Commissioners' Prefatory Note; Rubin, *supra* note 9, at 670. Other state statutes explicitly provide for intrastate enforcement as well as interstate enforcement when the challenged practice has a local nexus and federal authorities have not intervened. *See, e.g.,* Bladen, *The Need for a New Antitrust Statute* 5 (undated) (unpublished report for the Michigan Attorney General's Office); Almstedt and Tyler, *supra* note 84, at 518. *But see* State v. Waste Management of Wis., Inc., 81 Wis. 2d 555, 261 N.W.2d 147 (1978).

cated jurisdiction of our State and Federal Government.[121]

Subsequently, Mr. Justice Holmes, in *Standard Oil Co. of Kentucky v. Tennessee*[122] declared that the Tennessee antitrust act was a valid regulation even though it operated to remove an interference from interstate commerce.

In response to the legislative purpose that the act supplement state activity and the absence of any United States Supreme Court interpretation that local antitrust laws would be preempted, many federal[123] and state[124] courts have ruled that federal antitrust legislation does not preempt the field. For example, the Second Circuit has recognized that "[s]tate antitrust policy is not ousted from the regulation of local matters which may also be affected by federal laws."[125] A recent New Jersey decision, *State v. Lawn King, Inc.*,[126] also rejected the idea that state regulation affecting interstate commerce is federally preempted. The court noted that if preemption was the rule, all state regulation would fall because each "enterprise, however localized, has some effect, however remote, on interstate commerce. . . . That is why federal courts have held that the Sherman Act applies only where the business activities 'substantially affect interstate commerce.' "[127] In addition, the court concluded that although many areas require exclusive federal regulation, since Congress and the Supreme Court have never delineated those areas in the Sherman Act's long history, no preemption could be found.[128] Finally, the court rejected the argument that failure to find preemption would subject the defendant to conflicting state and federal law, because many interstate concerns are subject to both state and federal regulation.[129]

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121. 21 CONG. REC. 2456-57 (1890) (emphasis added).

122. 217 U.S. 413 (1910).

123. *See, e.g.*, Flood v. Kuhn, 443 F.2d 264 (2d Cir. 1971), *aff'd on other grounds*, 407 U.S. 258 (1972); Woods Exploration & Producing Co. v. Aluminum Co. of America, 438 F.2d 1286 (5th Cir. 1971) *cert. denied*, 404 U.S. 1047 (1972); Matthews Conveyor Co. v. Palmer-Bee Co., 135 F.2d 73 (6th Cir. 1943).

124. *See, e.g.*, Speegle v. Board of Fire Underwriters, 29 Cal. 2d 34, 172 P.2d 867 (1946); Commonwealth v. McHugh, 326 Mass. 249, 93 N.E.2d 751 (1950); People's Sav. Bank v. Stoddard, 359 Mich. 297, 102 N.W.2d 777 (1960); State v. Lawn King, Inc., 150 N.J. Super. 204, 375 A.2d 295 (Law Div.) *supplemented on other grounds*, 152 N.J. Super. 333, 377 A.2d 1214, (Law Div. 1977); Leader Theater Corp. v. Rand Force Amusement Corp., 186 Misc. 280, 58 N.Y.S.2d 304 (Sup. Ct. 1945), *aff'd*, 273 App. Div. 844, 76 N.Y.S.2d 846 (1948); Texas v. Southeast Tex. Chapter of Nat'l Elec. Contractors Ass'n., 358 S.W.2d 711 (Tex. Civ. App. 1962); Washington v. Sterling Theaters Co., 64 Wash. 2d 761, 394 P.2d 226 (1964); State v. Allied Chem. & Dye Corp., 9 Wis. 2d 290, 101 N.W.2d 133 (1960).

125. Flood v. Kuhn, 443 F.2d 264, 267 (2d Cir. 1971) *aff'd on other grounds*, 407 U.S. 258 (1972).

126. 150 N.J. Super. 204, 375 A.2d 295 (Law Div. 1977).

127. *Id.* at 218-19, 375 A.2d at 302 (citations omitted). *See* Rasmussen v. American Dairy Ass'n, 472 F.2d 517, 526 (9th Cir.), *cert. denied*, 412 U.S. 950 (1973).

128. *Id.* at 217, 375 A.2d at 301; *see* State v. Allied Chem. & Dye Corp., 9 Wis. 2d 290, 101 N.W.2d 133 (1960).

129. 150 N.J. Super. at 216, 375 A.2d at 301. The court offered the example that manu-

Although these decisions permit state laws to extend beyond intrastate activities, a concerted effort must be made to coordinate state and federal enforcement. The position of the Antitrust Division of the United States Department of Justice is "that federal and state antitrust enforcement will be most effective in preserving the benefits of a free and competitive economy to the extent that the respective enforcement activities of each are complementary."[130] Thus, antitrust enforcement is a particularly appropriate area for state and federal cooperation to enforce a national policy that extends from local competitive impediments to major interstate trade restraints and monopolies.[131]

B. Uniformity v. Particularization

The National Conference of Commissioners on Uniform State Laws has drafted antitrust legislation that it recommends for adoption by the states.[132] Presumably, this legislation both eases the compliance burden on multistate operations without substantially increasing the burden of complying with federal law[133] and obviates litigation to determine what state law governs in private damage actions.[134] These are cogent reasons supporting the adoption of some consistent legislation for the states, but the deficiencies in the Uniform Act are patent,[135] and more particularized drafting is necessary.

States that are entering the antitrust enforcement field should adopt laws patterned after the federal law to enable state courts to

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facturers of automobiles and childrens' garments that are treated with flame retardants are subject to various levels of state and federal law. *Id.*

Furthermore, in State v. Allied Chem. & Dye Corp., 9 Wis. 2d 290, 101 N.W.2d 133 (1960), the court based its finding against preemption, in part, on the basis that there was no inherent conflict in the policies behind the state and federal antitrust laws.

130. GRANTS, *supra* note 82, at 7.

131. Section 4(f) of the Clayton Act expressly directs the United States Attorney General to cooperate with state officials by informing state attorneys general when a *parens patriae* action may be appropriate, and also to give state attorneys general, upon request, relevant information obtained by the federal department. 15 U.S.C. § 15(f) (1976). A recent federal district court decision expanded the scope of available information to evidence gathered by federal grand juries. *In re* Montgomery County Real Estate Antitrust Litigation. [1978-1] TRADE CAS. (CCH) ¶62,070 (D.Md. 1978).

Cooperation between officials of various states is also a valuable enforcement aid. This coordination is provided in a bill presently pending in the Pennsylvania House of Representatives, Pa. H. No. 845, Printer's No. 2578, Session of 1977 [hereinafter cited as H.B. 845], § 22, and is encouraged by the United States Department of Justice. *See* GRANTS, *supra* note 82, at 8.

132. UNIFORM STATE ANTITRUST ACT. This proposal is presently pending in the Pennsylvania Senate in substantially unamended form as Pa. S. No. 681, Printer's No. 723, Session of 1977 [hereinafter cited as S.B. 681]. Only Arizona has adopted the Uniform Act since it was promulgated in 1973. ARIZ. REV. STAT. §§ 44-1401 to 44-1413 (Supp. 1977).

133. UNIFORM STATE ANTITRUST ACT, Commissioners' Prefatory Note.

134. *Id.*; Rubin, *supra* note 9, at 724.

135. *See* notes 142-46, 175, 177, 183, 189-92, 204-05 and accompanying text *infra*.

use federal cases for guidance and precedent.[136] "Such a procedure eases the problem often encountered in state courts: the unfamiliarity of the state judiciary, at least in the inferior tribunals, with the antitrust field."[137] Furthermore, state regulations must be tailored to the needs of the individual state.[138]

C. Substantive Prohibitions

At present, two antitrust bills are before the Pennsylvania General Assembly- S.B. (Senate Bill) 681[139], which is modeled after the Uniform Act, and H.B. (House Bill) 845.[140] Both of these bills address the fundamental restraint of trade offense as it was developed at common law and codified and expanded under the Sherman Act. The senate bill, however, adds the caveat that the restraint on trade must occur within a relevant market.[141] This addition greatly transcends Sherman Act jurisprudence, for violations that are per se unreasonable have never been subject to relevant market analysis.[142] Nevertheless, the jurisdictional scope of the senate bill is less defined than the house proposal because its coverage is limited to the relevant market; *i.e.* "[t]he geographical area of actual or potential competition in a line of commerce, all or any part of which is within this Commonwealth."[143] House Bill 845, however, applies to trade or commerce that is defined as "[t]he advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value wherever situate and includes any trade or commerce directly or indirectly affecting the people of this Commonwealth."[144]

An antimonopoly section is also contained in both pieces of legislation. The House approach closely parallels the Sherman Act by prohibiting any person from monopolizing, attempting to monopolize, or combining or conspiring with any other person or persons to

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136. *Cf.* Rahl, *supra* note 57, at 772-73 (noting that caution should be exercised in copying the federal jurisprudence).

137. *State Antitrust Revival, supra* note 66, at 587 (footnote omitted).

138. Rubin, *supra* note 9, at 656; *see, e.g.*, HAWAII REV. STAT. § 480-31 (1976) (allows two Honolulu newspapers to have joint ownership and separate editorial policies on the rationale that it is better to allow partial merger and retain independent comment than to lose that comment through complete merger); N.C. GEN. STAT. § 75-17 (1975) (prohibits specific tie-in by lenders who attempt to require borrowers to deal with particular insurers).

139. S.B. 681, *supra* note 132, at §3. Criticisms addressed to S.B. 681 apply directly to the Uniform Act.

140. H.B. 845, *supra* note 131, at §3.

141. S.B. 681 *supra* note 132, at §3.

142. *See* Dunne, *supra* note 31, at 333 n.19 (Oregon rejected relevant market analysis for restraints of trade in its antitrust law). *Contra*, UNIFORM STATE ANTITRUST ACT § 2 Commissioners' Comment.

143. S.B. 681 *supra* note 132, at §2 (UNIFORM STATE ANTITRUST ACT §1).

144. H.B. 845, *supra* note 131, at §3.

monopolize any part of trade or commerce within Pennsylvania.[145] Senate Bill 681 narrows the offense of conspiracy to monopolize with the denunciation that, "[t]he establishment, maintenance or use of a monopoly, or an attempt to establish a monopoly, of trade or commerce in a relevant market by any person for the purpose of excluding competition or controlling, fixing or maintaining prices is unlawful."[146] The Sherman Act does not require proof of a predatory intent to control competition and prices. The senate proposal thus places an additional burden on antitrust plaintiffs, a burden that might be more appropriately borne by a monopolist defendant as an affirmative defense to prove the absence of that intent.[147]

D. Exemptions

Various activities are exempt from the Sherman Act, most notably, the activity of labor and agricultural organizations acting unilaterally in furtherance of their legitimate goals.[148] Similar exclusions serve an important function at the state level. Although the senate bill directly parallels the two noted federal exemptions,[149] the house bill goes further and excludes from coverage acts of consumer organizations and their members that are directed solely to legitimate consumer objectives.[150] Under the house scheme, activities regulated by the state or federal governments would be exempt if that regulation were so comprehensive that antitrust enforcement is unnecessary or would be disruptive of the regulatory structure.[151] This

145. *Id.* § 5.

146. S.B. 681, *supra* note 132, at § 4 (UNIFORM STATE ANTITRUST ACT § 3).

147. *See* STATE ANTITRUST LAWS, *supra* note 9, at 12-13; Dunne, *supra* note 31, at 333 n.19; Rubin, *supra* note 9, at 729.

148. 15 U.S.C. § 17 (1976).

149. S.B. 681, *supra* note 132 at § 5 (UNIFORM STATE ANTITRUST ACT § 4).

150. S.B. 845, *supra* note 132 at § 6(a) (3).

151. *Id.* § 6(b); *see, e.g.,* OR. REV. STAT. § 646.740(30) (1977). This provision is based on the act of state exemption first announced in Parker v. Brown, 317 U.S. 341 (1943). *But see* Bladen, *supra* note 120, at 11 (competitors may more easily combine when their action is exempt from antitrust liability). The *Parker* doctrine exempts anticompetitive conduct engaged in as an act of government, by the state as sovereign, or its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service.

While the state action exemption was initially broad, that doctrine of immunity has recently been narrowed. The Supreme Court ruled in *City of Lafayette, Louisiana v. Louisiana Power & Light Co.,* 435 U.S. 389 (1978) that municipal utility operators are considered persons within the meaning of the federal antitrust laws and that there is no implied exclusion from the Sherman Act for municipal utilities. The plurality opinion echoed the *Parker* doctrine and emphasized that anticompetitive conduct is permissible only when it is undertaken pursuant to valid state policy to displace competition.

In *United States v. Texas State Board of Public Accountancy,* [1978-1] TRADE CAS. (CCH) ¶62,039 (W.D.Tex. 1978) the United States District Court in Texas struck down a rule promulgated by the Texas accountancy board that prohibited licensed public accountants from making competitive bids for their professional services. The Board sought to sustain the rule based on the state action exemption. The rule had been putatively issued pursuant to a Texas statute that authorized the Board to promulgate rules to establish and maintain a high degree of integrity in the accounting profession. The court held, however, that the *Parker* doctrine

type of exemption is consistent with federal law and helps to insure that businesses will not be subject to regulatory "overkill."[152]

E. Official Investigations

Potent investigative authority is necessary for the attorney general to detect the existence of antitrust violations.

> [E]ffective enforcement requires full and comprehensive investigation before formal proceedings . . . are commenced. Incomplete investigation may mean proceedings not justified by more careful search and study. Public retreat by the prosecutor may then be difficult, if not impossible, and the result may be a public trial exhausting the resources of the litigant and increasing court congestion. Thus the adequacy of investigatory processes can make or break any enforcement program.[153]

Early state antitrust laws did not authorize an adequate precomplaint civil investigative process. Instead state enforcement agencies possessed three equally unsatisfactory alternatives-- "the voluntary cooperation of suspects and witnesses, the filing of a civil complaint for the purpose of utilizing discovery procedures, and resort to grand jury processes."[154] Authorization of precomplaint civil investigative demands (CID's) for state attorneys general thus becomes an integral component of any serious antitrust enforcement program.[155]

Both proposals before the General Assembly follow the amended version of the Antitrust Civil Process Act[156] and include similar provisions authorizing civil investigative process. The investigative device of the House version is designated an antitrust investigative subpoena[157] that will issue from the Commonwealth Court when that court has reason to believe the subpoenaed person may have knowledge of or subpoenaed documents may contain matter

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did not immunize the defendant from liability because the statute did not mandate the anticompetitive conduct that the rule required.

Furthermore, a United States Justice Department official recently indicated that any regulatory activity undertaken by state and local governments could raise antitrust issues. At a speech before the 72nd Annual Conference of the Municipal Finance Officers Association in Houston, Texas, on May 15, 1978, Joe Sims, the Deputy Assistant Attorney General of the Antitrust Division, concluded that the only thing that is clear regarding the state action exemption is that the current United States Supreme Court is not easily impressed with state action defenses.

152. *See* note 151 *supra*.

153. ATTORNEY GENERAL'S NATIONAL COMMISSION TO STUDY THE ANTITRUST LAWS, REPORT 343-44 (1955).

154. Rubin, *supra* note 9, at 715.

155. For example, in Minnesota CID's are one of the most valuable tools to investigate antitrust complaints. Often the Minnesota Attorney General's Office will receive complaints or uncover suspicious activity that could not be pursued without CID's. Letter from Alan H. Maclin, Special Assistant Attorney General, Antitrust Division, Office of the Attorney General, State of Minnesota, to Martin Howard Katz, Deputy Attorney General, Chief—Antitrust Division, Pennsylvania Dep't of Justice (June 28, 1978).

156. 15 U.S.C. §§ 1311-1314 (1976).

157. H.B. 845, *supra* note 131, at § 8(b).

relevant to an investigation.[158] The senate bill is broader in allowing the demand to require the production of information or any tangible object (not merely a document) when the attorney general has reasonable cause to believe the person served is in possession or control of the information or object.[159] If the person served does not comply with or objects to service, the attorney general may then seek a court order directing compliance.[160]

Confidentiality of material obtained through civil investigative process is important to encourage compliance and this need is recognized in the House and senate legislation. Information derived from a demand authorized by the senate bill remains confidential unless the individual testifying or producing the document grants a waiver, or if the court authorizes disclosure.[161] The house version also allows the person named in the antitrust investigative subpoena to waive confidentiality of information supplied.[162]

In addition to the screen of confidentiality, the house bill provides other protection to those served with antitrust investigative subpoenas. The attorney general may not request privileged matter or other information that would be unreasonable or improper if demanded by any other Pennsylvania court.[163] The person producing the information may retain a copy of the document or transcript.[164] A person giving testimony may also have his attorney present in a nonparticipatory role.[165] By incorporating these safeguards against improper intrusion into an individual's right to privacy, the house legislation attains a more equitable balance between private rights and the need for effective law enforcement procedures.[166]

F. Penalties and Remedies

A broad range of punitive and remedial devices are essential to any legislative antitrust program. The state must be empowered to

158. *Id.* at § 8 (c). The antitrust investigative subpoena is not available, however, once any state statutory antitrust action is brought against an individual who would otherwise be served. *Id.* at § 8(b).

159. S.B. 681, *supra* note 132, at § 7(a) (UNIFORM STATE ANTITRUST ACT, § 6(a)).

160. S.B. 681, *Id.* at § 7(b) (UNIFORM STATE ANTITRUST ACT, § 6(b)).

161. S.B. 681, *Id.* at § 7(c) (UNIFORM STATE ANTITRUST ACT,§ 6(c)), roughly paralleling the Hart-Scott-Rodino Antitrust Improvements Act of 1976, § 4(c)(3), 15 U.S.C. § 1313 (1976).

162. H.B. 845, *supra* note 131, at § 8(k). In addition, those served with antitrust investigative subpoenas may obtain information supporting the subpoena unless it is privileged or is subject to a protective order. *Id.* § 8(j). Thus, during the course of an investigation, information supplied at an early stage, and upon which a later antitrust investigative subpoena issues, may be obtained by the person subsequently served.

163. *Id.* at § 8(e).

164. *Id.* at § 8(j), paralleling the Hart-Scott-Rodino Antitrust Improvements Act of 1976, § 3(i)(2), 15 U.S.C. § 1312 (i)(2),(6) (1976).

165. H. B. 845, *supra* note 131, at § 8(j).

166. *Statement of Vincent Yakowicz, supra* note 15, at 5.

impose criminal and civil[167] sanctions on offenders, and injured persons must be able to secure compensation for injuries sustained. Injunctive relief is also vital to enable public and private plaintiffs to terminate continuing and threatened irreparable harm resulting from unreasonable trade restraints.

1. Criminal Penalties.—Criminal penalties serve the fundamental goals of retribution, rehabilitation, protection of the public[168] and deterrence. Although imprisonment attains these objectives with greater potency than criminal fines, corporations are only subject to fines.[169] Numerous authorities have observed that fines do not adequately deter anticompetitive conduct, but instead are often viewed as mere "license fees."[170] Moreover, even the possibility or likelihood of large fines may play no deterrent role when an executive knows his legal expenses will be reimbursed by his corporation.[171] Nevertheless, the availability of jail terms has also been subject to substantial criticism. Critics contend that such harsh penalties deter competitor complaints,[172] seem disproportionate to the wrong committed, and are not administered consistently.[173] These contentions were considered in *State v. Lawn King, Inc.,*[174] but the court declined to accept them, reasoning as follows:

> [T]he basis of the charge is that the defendants have abused a trust, the result of which is destructive of the overall fabric of our society that is based on the spirit of free enterprise. . . .
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> The taking of money from the public by such illegal activity is no different than the illegal taking of money by the butcher who puts his thumb on the scale or the vendor who dilutes his product with water or another product. In all of these cases the public is

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167. Often the evidence in a case may be insufficient for the state to obtain a criminal conviction, although the lesser burden of proof for civil remedies may be met. Also, budget priorities day render criminal prosecutions a deficient resolution of a violation. STATE ANTITRUST LAWS, *supra* note 9, at 62. Therefore both civil and criminal sanctions including consent decrees should be available to the state.

On the need for criminal penalties, *see* notes 168-175 and accompanying text *infra.*

168. A legislature may obviate the rehabilitation and incapacitation goals with respect to individual offenders without imposing a jail sentence. *See, e.g.,* N.J. STAT. ANN. § 56:9-11 (Supp. 1977) (any individual who is a principal, agent, or major shareholder of a corporation and who knowingly violates the state antitrust law is forbidden from dealing directly or indirectly with the corporation).

169. *See also* J. Flynn, *Criminal Sanctions Under State and Federal Antitrust Laws,* 45 TEX. L. REV. 1301 (1967) (chief value of criminal fine against a corporation is that the business entity is branded a criminal).

170. State v. Lawn King, Inc., 152 N.J. Super. 333, 340, 377 A.2d 1214, 1218 (Law Div. 1977); STATE ANTITRUST LAWS, *supra* note 9, at 63 (Wisconsin antitrust staff feels the availability of imprisonment aids witness cooperation); Almstedt & Tyler, *supra* note 84, at 506.

171. Soma, *supra* note 59, at 31.

172. *Id.*; Rahl, *supra* note 57, at 764; Rubin, *supra* note 9, at 512.

173. *State Antitrust Laws, supra* note 9, at 63; Rubin, *supra* note 9, at 712. These arguments must fail when confronted by egregious, invidious, and coercive anticompetitive practices.

174. 152 N.J. Super. 333, 377 A.2d 1214 (Law Div. 1977).

ultimately compelled to pay a greater price.[175]

S.B. 681 has no criminal penalties; this is one reason that contributed to the rejection of the Uniform Act in Oregon.[176] Conversely, the house proposal would permit corporate criminal fines to reach $1,000,000 while other legal entities could be fined up to $100,000 and natural persons could also receive up to three years incarceration.[177] The fines recovered by the state would be placed into an antitrust enforcement fund to finance state antitrust activities.[178] A moderately successful antitrust record could thus render state enforcement self-sustaining[179] although the attorney general's activity should be subject to some safeguards ensuring that the legislature retains control over the enforcement program. This result could be achieved by requiring that the General Assembly annually appropriate funds that have been deposited in the antitrust enforcement fund prior to expenditure by the attorney general.

2. Civil Penalties.— Regardless of whether criminal sanctions are pursued, the attorney general may also seek a civil penalty of up to $100,000 or $500 per day per violation under the house proposal.[180] The Uniform Act/Senate version would merely permit an assessment of a $50,000 civil penalty.[181]

The forfeiture of a corporate charter or the right to do business in the state is another available civil penalty. Although this punitive measure has deterrent effect, it is harsh and should be invoked with caution,[182] for if forfeiture means that a local business will cease operation, the local economy will be injured to the extent that jobs are lost and income producing capacity is reduced. If forfeiture of the right to do business would only result in transfer of ownership of a

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175. *Id.* at 336, 377 A.2d at 1216.

176. Dunne, *supra* note 31, at 333 n.19.

177. H.B. 845, *supra* note 31 at § 14(b). Criminal defendants are protected, however, since criminal penalties are imposed only when *knowing* violations occur or when a principal, agent or major shareholder *knowingly aids* the violation. *Id. See* N.J. STAT. ANN. § 56:9-11(b) (Supp. 1977) (similar "knowing" requirements).

178. H. B. 845 *supra* note 131, at § 18. The enforcement fund would be the repository of money received by Pennsylvania from the attorney general's enforcement of Pennsylvania or federal antitrust law. Thus, when the state sues in its proprietary capacity in either state (*see* note 190-93 and accompanying text *infra*) or federal (*see* note 53 and accompanying text *supra*) courts, those recoveries are placed in the antitrust enforcement fund. The Uniform Act-Senate bill does not authorize an antitrust revolving fund.

179. Nine states have antitrust enforcement funds, known generically as antitrust revolving funds. ARIZ. REV. STAT. § 41-191.02 (1974); CAL. BUS. & PROF. CODE § 12526 (West 1964); KAN. STAT. § 75-713 (1977); MO. ANN. STAT. § 416.081 (Vernon Supp. 1978); N.J. REV. STAT. § 58:4-14 (1977); OHIO REV. CODE ANN § 109.82 (Baldwin 1978); OR. REV. STAT. § 180.095-97 (1978); WASH. REV. CODE § 43.10.220 (1976); W. VA. CODE § 47-18-19 (1976).

180. H.B. 845, *supra* note 131, at § 12(a).

181. S.B. 681, *supra* note 132, at § 8 (UNIFORM STATE ANTITRUST ACT § 7).

182. Atkins, *The Illinois Attorney General's Role In Consumer Protection—Illinois Antitrust Act, Consumer Fraud Act, And Other Available Remedies,* 15 ANTITRUST BULL. 367, 374 (1970); Dunne, *supra* note 31, at 343; Soma, *supra* note 59, at 43.

business entity, however, no aggregate loss to the state's economy[183] will occur. Concomitantly, no loss to the economy would be generated if the offending franchise were lost and the controlling parties resumed business operations as another enterprise.

Although the senate bill makes no provision for remedial forfeiture, the house bill allows forfeiture and permits the appropriate court to place the business in receivership to allow damaged plaintiffs to claim assets as general creditors.[184]

3. Private Enforcement.—An effective antitrust statute must also encourage private litigation to ease the state's enforcement burden and to provide redress for injured parties.[185] Allowing plaintiffs to sue for treble damages[186] is an incentive to private enforcement and serves the goals of deterrence and punishment.[187] The bills pending in the Pennsylvania legislature provide for treble damages for injured persons, but whereas the award is automatic under the House bill,[188] the senate proposal allows treble damages only if the court finds that the violation is flagrant.[189]

4. State Treble Damages Recovery.—When the state is suing in its proprietary capacity for damages sustained—such as overcharges for price fixing in public procurement—it should also be permitted to seek treble damages. As a damaged purchaser, the state should not be treated differently from other plaintiffs.[190] Although the senate proposal[191] follows those commentators who would limit state recovery to single damages,[192] the house version

183. When an individual is prohibited from conducting business within the state, the enterprise may continue in operation with no loss to the local economy if the convicted party merely sells his interest in the firm.

184. H.B. 845, *supra* note 131, at § 12 (c),(d).

185. United States v. Borden Co., 347 U.S. 514, 518 (1954); Osborne v. Sinclair Refining Co., 324 F.2d 566, 572 (4th Cir. 1963); Klor's Inc. v. Broadway-Hale Stores, 255 F.2d 214, 217 (9th Cir. 1958), *rev'd on other grounds*, 359 U.S. 207 (1959); Kinnear-Weed Corp. v. Humble Oil and Refining Co., 214 F.2d 891, 893 (5th Cir. 1954).

186. State treble damage authorizations are patterned after §§ 4f and 4a of the Clayton Act. 15 U.S.C. §§ 15, 15a (1976).

187. Mohr & Sons, Inc. v. Janhke, 55 Wis. 2d 402, 411-12, 198 N.W.2d 363, 368 (1973); Almstedt & Tyler, *supra* note 84, at 490 n.1.

188. H.B. 845, *supra* note 131, at § 10.

189. S.B. 681, *supra* note 132, at § 9(b) (UNIFORM STATE ANTITRUST ACT § 8(b)). The Uniform Act is so worded because "the automatic trebling of damages under the Clayton Act . . . can bring about an *in terrorem* settlement by a defendant of a defensible case." UNIFORM STATE ANTITRUST ACT § 8, Commissioners' Comment.

190. Almstedt & Tyler, *supra* note 84, at 518; Letter from Alvin Alexanderson, Assistant Attorney General, Antitrust Division, Oregon Department of Justice, to Martin Howard Katz, Deputy Attorney General, Chief—Antitrust Division, Pennsylvania Dep't of Justice (June 20, 1978) (Oregon has brought no damage actions under state law, partly because the state is limited to single damages).

191. S.B. 681, *supra* note 132, at § 9(a) (UNIFORM STATE ANTITRUST ACT § 8(a)).

192. UNIFORM STATE ANTITRUST ACT § 8, Commissioners' Comment; Rubin, *supra* note 9, at 708 (state does not require the encouragement of treble damages because the state

makes the treble damage award available to any public body of the Commonwealth.[193]

5. Parens Patriae Suits.—Attorney general *parens patriae*[194] suits in Pennsylvania courts brought on behalf of injured natural persons, who are residents of Pennsylvania, are another essential weapon in the antitrust arsenal. Although the Uniform Act/senate version contains no *parens patriae* authorization, the house bill explicitly defines a procedure that closely parallels the federal law.[195] Under the house bill, when the attorney general initiates a suit on behalf of injured individuals, he must provide them with notice of the action.[196] Those who wish to opt out and pursue their claims independently may do so; failure of a potential plaintiff to indicate that he wishes to exclude his claim from any judgment will render the claim res judicata.[197] Because calculation and distribution of damages in *parens patriae* litigation can become an unwieldy task if not subject to strict guides, H.B. 681 stipulates that in price fixing cases damages may be calculated by statistical or sampling methods[198] and by specifying the manner of distributing any recovery.[199] Thus, not only is *parens patriae* litigation feasible but it is an essential tool enabling the attorney general to act as advocate for the Commonwealth's citizens.[200]

6. Indirect Purchaser Suits.—*Parens patriae* authorization, without more, may not be an adequate legislative declaration to protect damaged consumers. A positive legislative policy must also explicitly permit an indirect purchaser to sue antitrust violators whose offense has resulted in injury to the ultimate purchaser. Although this is the only suggested provision that does not presently parallel the federal law, it is the *sine qua non* for most price fixing suits (not

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attorney general is supported by a full-time staff and the state treasury); *see* Dunne, *supra* note 31, at 346-47.

193. H.B. 845, *supra* note 131, at § 10.

194. *See* note 53 *supra*.

195. 15 U.S.C. § 15c (1976).

196. H.B. 845, *supra* note 131, at § 11(b)(2), paralleling 15 U.S.C. § 15c(b)(1) (1976).

197. *Id.* at § 11(b)(3),(4), paralleling 15 U.S.C. § 15c(b)(2) (1976).

198. *Id.* at § 11(c), paralleling 15 U.S.C. § 15d (1976); *see generally* Hoyt, Dahl & Gibson, *Comprehensive Models For Assessing Lost Profits To Antitrust Plaintiffs,* 60 MINN. L. REV. 1233 (1976).

199. H.B. 845, *supra* note 131, at § 11(d), paralleling 15 U.S.C. § 15c (1976).

200. *Statement of Vincent Yakowicz, supra* note 15, at 6. Often the individual claims of consumers are so small that litigation would never be initiated by the actual injured party. *Parens patriae* authority overcomes this impediment.

The first state *parens patriae* suit, which was recently settled, resulted in an agreement to pay $3.5 million to injured California consumers. The complaint, California v. Levi Strauss & Co., filed with the Superior Court in San Francisco, No. 739024, June 2, 1978, alleged resale price maintenance by the manufacturer of "Levi's" pants, slacks and jeans. The money will be distributed to the Californians who purchased the firm's products at retail from 1972 to 1975, the alleged period of violation. *See* [1978] TRADE REG. REP. (CCH) 6 (June 26, 1978).

merely *parens patriae* actions). Furthermore, congressional activity to allow these suits is nearing the final stages.[201] While the Uniform Act/senate bill makes no provisions for such "pass-on" suits, the house bill[202] allows "pass-on" of price over charges to be used offensively by indirect buyers and defensively by defendants against plaintiffs who have not absorbed overcharges generated by anticompetitive practices.

7. Injunctive Relief.—Comprehensive antitrust legislation should include, in addition to penal and compensatory remedies, preventive relief to enjoin continuing and irreparable harm. Both proposals before the General Assembly contain sections that would allow injunctive relief on behalf of the state and threatened persons.[203] Furthermore, all the suggested remedies are cumulative proposals[204] reflecting the desire that comprehensive relief be available. The rights of defendants are safeguarded from the attorney general's unjustified use of the antitrust arsenal under the house bill by awarding attorney's fees to a prevailing defendant if legal action was commenced in bad faith, vexatiously or wantonly.[205]

8. Voluntary Compliance Procedures.—A pretrial settlement procedure is another valuable antitrust device because it allows the use of remedial measures without the expenditure of the requisite litigation costs. Although the Uniform Act/senate bill does not address the propriety of consent judgments, the house bill does allow an antitrust defendant to enter into an assurance of voluntary compliance (AVC) to discontinue the alleged violation and to make voluntary payments to damaged persons or public bodies.[206] Paralleling the federal law,[207] an AVC is not considered a violation

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201. *See* note 55 and accompanying text *supra*.

202. H.B. 845, *supra* note 131, at § 10.

203. S.B. 681, *supra* note 132, at § 8 (UNIFORM STATE ANTITRUST ACT § 7) (injunction in the name of the state); *Id.* at § 9 (UNIFORM STATE ANTITRUST ACT § 8(a)(injunction for other persons); H.B. 845, *supra* note 131, at § 9(b) (injunction for the state); *Id.* at § 9(c) (injunction for others).

204. S.B. 681, *supra* note 132, at § 12 (UNIFORM STATE ANTITRUST ACT § 11); H.B. 845, *supra* note 131, at § 21.

Cumulative remedies are constitutional despite their potential severity. In City of Madison v. Hyland, Hall & Co., 73 Wis. 2d 364, 243 N.W.2d 422, *appeal dismissed,* 429 U.S. 953 (1976), the court awarded the plaintiff cumulative remedies and stated that

> [m]ere severity of sanctions in antitrust cases does not make them per se excessive or disproportionate in a constitutional sense. What is at stake, in the legislature's judgment, is our system of free enterprise and competition. The constitutionality of the penalty is, therefore to be measured not by actual damages sustained by a private party, but by the value of the public's interest in enforcing the laws that are designed to preserve our economic system.

Id. at 387, 243 N.W.2d at 434.

205. H.B. 845, supra note 131, at § 11(e). The Uniform Act-Senate Bill contains no analogous section.

206. *Id.* at § 13.

207. 15 U.S.C. § 16(a) (1978); *see* Soma, *supra* note 59, at 38.

for any purpose.[208] But in both proposals an affirmative judgment in favor of Pennsylvania in an action in which testimony has been taken operates as prima facie evidence in certain subsequent proceedings.[209] The prima facie evidence procedure conserves judicial and adversarial resources by obviating the presentation of redundant evidence regarding identical issues in successive cases, thus performing a valuable function in antitrust enforcement.

V. Conclusion

Presently, the need for antitrust enforcement in Pennsylvania is vital. The attorney general and private parties must be given the power to move against local restraints of trade.[210] Penalties and remedies should operate efficiently to penalize violators, encourage private enforcement, and compensate those injured by violations. In sum, the antitrust program must ensure that trade and commerce flows unimpeded. This will require the legislature to take a decisive step and enact a comprehensive program undaunted by private business interests, for basic antitrust policy would entail no additional compliance burden beyond that imposed by the federal government.

Legislation alone, however, will not ensure productive antitrust activity. Adequate funds must also be appropriated by the General Assembly to supply the attorney general with the specialized staff that is required and to meet the cost of litigation until the recoveries from antitrust enforcement are sufficient to support prosecutions and civil actions on behalf of the state.[211] The antitrust problem exists and will continue to exist in Pennsylvania until an affirmative approach toward resolution is commenced. That solution rests in the hands of the legislature.

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208. H.B. 845, *supra*note 131 at §13; *see* Dunne, supra note 31, at 350.

209. S.B. 681, *supra* note 132, at § 10 (UNIFORM STATE ANTITRUST ACT § 9); H.B. 845, *supra* note 131, at § 17.

The House Bill provides that the judgment operates as prima facie evidence for all matters that would be an estoppel to the parties of the action. Although the terms of S.B. 681 are generally identical to the Uniform Act, § 10 of the former diverges slightly from § 9 of the latter. The Senate Bill would allow prior judgment to operate as prima facie evidence only in a subsequent action by the Commonwealth while the Uniform Act extends the evidentiary rule to actions brought by any person injured or threatened with injury in his business or property. Thus divergence probably reflects an oversight on the part of the draftsman of the Senate Bill, since the utility and purpose of consent procedures would be largely undermined under S.B. 681, § 10.

210. Rahl, *supra* note 57, at 771, 781; Soma, *supra* note 59, at 44.

211. Rahl, *supra* note 57, at 764; *State Antitrust Revival*, *supra* note 66, at 592.

Wisconsin Assistant Attorney General Michael Zaleski has identified four working essentials for state antitrust divisions: permanent legal personnel assigned to antitrust, permanent investigative personnel assigned to antitrust, money authorized for antitrust, and continual formal and informal investigations. STATE ANTITRUST LAWS, *supra* note 9, at 37.